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Office of Administrative Law Judges
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Issue Date: 29 September 2006

CASE NO.: 2004BLA06422

In the matter of

RD,
Claimant

v.

PERRY COUNTY COAL CORP.,
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party in Interest

Appearances: James D. Holliday, Esq.
For the Claimant

Lois A. Kitts, Esq.
For the Employer

Before: Daniel A. Sarno, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER AWARDING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. § 901 *et seq.* ("Act"), and the implementing regulations at 20 C.F.R. Parts 718 and 725 (2005). A hearing was held in Hazard, Kentucky on February 8, 2006. The findings of fact and conclusions of law that follow is based upon the testimony of Claimant at the hearing, all documentary evidence admitted into the record at the hearing, and the post-hearing arguments of

the parties. Although not specifically mentioned in this decision, each exhibit received into evidence has been carefully reviewed, particularly those relating to the Claimant's medical condition. The documentary evidence admitted at the hearing includes *Director's Exhibits (Dx.)* 1-37, *Claimant's Exhibits (Cx.)* 1-5, *Employer's Exhibits (Ex.)* 1-8, *Administrative Law Judge Exhibits (Ax.)* 1-3. The transcript of the hearing is cited as (*Tr.*) and by page number.

OVERVIEW OF THE BLACK LUNG BENEFITS PROGRAM

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust over a period of time, may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

ISSUES

1. Whether the evidence establishes that one of the applicable conditions of entitlement has changed since the previous claim denial became final pursuant to Section 725.309(d);
2. Whether Claimant has pneumoconiosis as defined by the Act and regulations;
3. Whether the Claimant's pneumoconiosis arose out of coal mine employment;
4. Whether Claimant is totally disabled; and
5. Whether Claimant's disability is due to pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Claimant, R.D., was born on September 5, 1959. He married Sharon Lynn Trent on September 22, 1979, and continues to support her though presently they do not live together.¹ They had no children who were under eighteen or dependent upon them at the time this claim was filed. *Tr.* at 18-19.

The Claimant stopped working on May 20, 2002, when his treating physician, Dr. Chaney, took him out of the mines. *Tr.* at 15. He has shortness of breath upon minimal exertion. If he walks as little as an eighth of a mile he is out of breath. *Tr.* at 17. His breathing problems leave him fatigued and he is presently prescribed medicine for his problems and in addition is using a nebulizer four times a day at home. *Dx.* 3, at 25. The record reveals that Claimant has a smoking history of one pack a day to present since the age of twenty, which makes him a twenty-six pack year smoker.

¹ Claimant and his wife have been physically separated for approximately one year and their legal separation is pending at the time of the hearing. *Tr.* at 18-20.

Claimant filed his application for black lung benefits on July 7, 2003. The office of Workers' Compensation Programs (OWCP) denied the claim on February 20, 2004. *Dx.* 30. Pursuant to Claimants request, the case was transferred to the Office of Administrative Law Judges for a formal hearing. *Dx.* 31.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the application of various statutory and regulatory presumptions. At the hearing, the parties stipulated that Claimant worked twenty years in qualifying coal mine work. *Tr.* at 6-7. Based upon the Administrative Law Judge's review of the record the stipulation is deemed accurate and the Claimant is credited with twenty years of coal mine employment.

The Claimant spent the majority of his coal mine employment underground doing strenuous manual labor. He was a section boss, ran equipment, bolted top, did bed work, shoveled belts, rolled up belts, worked on the belt structures, and had to move power. He occasionally had to carry in excess of a hundred pounds, and frequently had to carry in excess of fifty pounds. *Tr.* at 16.

MEDICAL EVIDENCE²

A claim filed after January 19, 2001, is subject to the revised regulations of Parts 718 and 725. These regulations impose two requirements on the submission of medical evidence. Initially, they require that the evidence be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §718.101 to 718.107. Secondly, the medical evidence must comply with the limitations of Sections 725.414, 725.456, 725.457, and 725.458. Regarding the initial evidence offered in support of entitlement to benefits, the regulations provide that claimants and responsible operators are limited to the submission of no more than two chest x-ray interpretations, two pulmonary function tests, two arterial blood gas studies, two medical reports, one report of each biopsy and one autopsy report. 20 C.F.R. § 725.414(a)(2)(i), (3)(i). In addition, the regulations caution that x-ray interpretations, pulmonary function studies, arterial blood gas studies, autopsy or biopsy reports, and physician opinions contained in a medical report "must each be admissible" under Section 725.414(a)(2)(i), (3)(i), (a)(4).

The regulations also provide limitations on medical evidence submitted in rebuttal of the opposing party's evidence. 20 C.F.R. § 725.414(a)(2)(ii), (3)(ii). Each party may submit no more than one physician interpretation of each chest x-ray, pulmonary function study, arterial blood gas study, and autopsy or biopsy report submitted by the opposing party. 20 C.F.R. § 725.414(a)(2)(ii), (3)(ii). A party may submit evidence rehabilitative of the evidence rebutted by the opposing party. The party is permitted to submit one "additional statement from the physician who originally interpreted the chest x-ray or administered the objective testing," or "from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." 20 C.F.R. § 725.414(a)(2)(ii), (3)(ii).

² The medical evidence summarized herein represents only the evidence submitted with the subsequent claim.

Neither party objected at the hearing under Section 725.414 to the admission of proffered evidence.³ After a review of all medical evidence included in the record, the administrative law judge (ALJ) finds no violations of the evidentiary limitations.

X-ray reports

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
<i>Dx 11*</i>	08/01/03	08/01/03	Baker-B	1/0
<i>Cx 1**</i>	08/01/03	11/03/05	Alexander-B & BCR	1/0
<i>Cx 5</i>	10/14/05	01/08/06	Alexander-B & BCR	1/0
<i>Ex 1</i>	10/14/05	10/14/05	Broudy-B	0/0
<i>Ex 5**</i>	08/01/03	09/12/05	Poulos- B & BCR	0/0

* The Claimant has adopted the initial U.S. Department of Labor (DOL) exam by Dr. Baker.

** Rebuttal evidence of DOL sponsored chest x-ray (In regards to the 11/03/05 Alexander reading as discussed in footnote 3 *supra*, the Claimant is now allowed to rebut a positive chest x-ray with another positive chest x-ray.)

Under qualifications in the above chart a “B-reader” (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Department of Health and Human Services (HHS). A designation of “Board-certified radiologist” (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. *See* 20 C.F.R. § 718.202(a)(ii)(C).

Pulmonary Function Studies

Exhibit No.	Physician	Date of Study	Age/ Height	Broncho-Dilator?	FEV1	FVC	FEV1/ FVC	Qualify- ing
<i>Dx11</i>	Baker	08/01/03	43/70”	No	1.71	4.33	39	Yes
<i>Dx11</i>	Baker	09/30/03	44/70”	No	1.71	3.89	44	Yes
<i>Ex1</i>	Broudy	10/14/05	46/70”	No	1.88	4.00	47	Yes
<i>Ex1</i>	Broudy	10/14/05	46/70	Yes	1.93	3.88	50	Yes

³ At the hearing the Employer’s counsel requested, and the ALJ agreed, to reclassify *Cx. 1* on the *Ax. 1* from the rebuttal of Department sponsored chest x-ray study heading to initial evidence heading. *Tr.* at 7-11. Subsequent to the hearing the Benefits Review Board (“BRB” or “the Board”) clarified the law and held that a Party may rebut a positive x-ray interpretation with another positive x-ray interpretation. *Sprague v. Freeman United Mining Co.*, BRB No. 05-1020 BLA (Aug. 31, 2006). Hence, the alteration done by hand on *Ax. 1* at the hearing is to be undone. Therefore, the additional x-ray interpretation dated March 6, 2006 by Dr. Wiot will not be considered in the determination of this case. Though, in *arguendo*, even if Dr. Wiot’s x-ray interpretation would have been considered the ALJ’s ruling would not have changed.

Arterial Blood Gas Studies

Exhibit No.	Physician	Date of Study	pCO2	pO2	Resting R Exercising E	Qualifying
<i>Dx11</i>	Baker	08/01/03	44	68	R	No
<i>Ex1</i>	Broudy	10/14/05	40.4	66.2	R	No

Narrative Medical Evidence

Glen R. Baker, M.D., examined Claimant on August 1, 2003 on behalf of the DOL as the initial required examination; Claimant subsequently adopted the examination as his own, it is labeled *Dx. 11*. This examination was discussed in Dr. Baker's deposition of December 12, 2005, the deposition is labeled *Cx. 4*. He provided a full pulmonary workup, including a chest x-ray, a pulmonary functions test,⁴ and an arterial blood gas study. He considered a twenty-three year work history and a twenty-six pack-year smoking history. Dr. Baker diagnosed Claimant with legal pneumoconiosis and opined that it was partly caused and then aggravated by coal dust exposure. He determined that based on his physical exam and the aforementioned test results that the Claimant was totally disabled, primarily due to his lung disease, which is due, in part, to his cigarette smoking and, in part, to his coal dust exposure and overall to both. Dr. Baker is board certified in Internal Medicine and Pulmonary Medicine, and did a Fellowship in Respiratory and Environmental diseases.

George R. Chaney, M.D., was Claimant's treating physician for over twenty years and provided a medical report on October 29, 2005, labeled *Cx. 2*. In his report Dr. Chaney diagnosed both "legal" and "clinical" pneumoconiosis. He stated that the condition had been "significantly contributed to, or substantially aggravated by, dust exposure in coal mine employment." He further diagnosed the Claimants pulmonary impairment as a severe impairment. He based his opinion on clinical examination of the Claimant, Claimant's history of coal dust exposure and his experience in working with coal miners suffering with the disease. He determined that based on Claimant's respiratory capacity he would no longer be able to perform the work of a coal miner or comparable work in a dust-free environment. Dr. Chaney was aware of Claimant's smoking history. Dr. Chaney opined that Claimant's impairment is caused by a combination of cigarette smoking and coal dust exposure.

Dr. Chaney also supplied Claimant's medical records from April 2002 through June 2005, labeled *Cx. 3*. The treatment record shows that the Claimant saw Dr. Chaney on average five times per year. Dr. Chaney performed pulmonary function studies and treated the Claimant for acute and chronic bronchitis, dyspnea, and coal workers' pneumoconiosis. He determined from a pulmonary function study that Claimant has a restrictive and obstructive defect patterns. And upon physical exam his lung fields have decreased breath sounds. Dr. Chaney has been the company physician for two large coal companies and is quite familiar with coal workers' pneumoconiosis.

⁴ The initial pulmonary function study was determined to be invalid; there was a subsequent pulmonary function study by Dr. Baker on September 30, 2003 that was stipulated to be a valid test at the hearing. *Tr.* at 6-7.

Bruce C. Broudy, M.D., examined Claimant on October 14, 2005 and issued an examination report on that date. The examination consisted of the pertinent history and physical examination, pulmonary function studies, arterial blood gas study and chest x-rays. He considered a twenty-three year work history and a twenty-six pack-year smoking history. Dr. Broudy determined that the pulmonary function tests showed moderately severe obstructive airways disease with insignificant responsiveness to bronchodilation. Additionally, the lung volumes showed marked hyperinflation and air trapping and the claimant's diffusing capacity is significantly diminished. Dr. Broudy opined that Claimant's spirometry abnormalities are the result of cigarette smoking and not coal dust exposure. He found no evidence, x-ray or otherwise, of pneumoconiosis. Dr. Broudy is board certified in Internal Medicine and Pulmonary Medicine, and did a Fellowship in Pulmonary Medicine.

David M. Rosenberg, M.D., M.P.H., issued a medical opinion on December 28, 2005. Dr. Rosenberg did not examine Claimant himself but relied on the evaluations of Drs. Baker and Broudy, and the records of Dr. Chaney. He considered a twenty-three year work history and a long history of smoking. From a functional perspective, Dr. Rosenberg found that Claimant had a severe airflow obstruction, which is clearly disabling. He opined that Claimant had severe Chronic Obstructive Pulmonary Disease (COPD) and would not be able to perform his previous coal mining activities or similarly arduous types of labor. Dr. Rosenberg opines that Claimant has neither legal nor clinical pneumoconiosis. In addition Dr. Rosenberg states that Claimant's disability from chronic obstructive disease is caused by his continued cigarette smoking and has nothing to do with his exposure to coal dust. Dr. Rosenberg is board certified in Internal Medicine, Occupational Medicine, and Pulmonary Disease, additionally he has a Masters of Public Health.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, a claimant must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d); *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). The U.S. Supreme Court stated that where the evidence is equally probative, the claimant necessarily fails to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries, et al.*, 512 U.S. 267 (1994).

Subsequent Claim

Claimant's previous claim for benefits was denied on August 22, 1994. As a result, the claim involved in this proceeding, filed on July 7, 2003, constitutes a "subsequent claim" under the regulations. The provisions of Section 725.309(d) apply to subsequent claims and are intended to provide relief from the traditional notions of *res judicata*. Under Section 725.309(d), subsequent claims must be denied on the grounds of the prior denial unless the evidence demonstrates that one of the applicable conditions of entitlement has changed since the prior

denial. 20 C.F.R. § 725.309(d). The initial analysis is limited to a review of the condition or conditions of entitlement upon which the prior denial was based. A claim may be adjudicated if newly submitted evidence establishes “at least one applicable condition of entitlement.” 20 C.F.R. § 725.309(d)(3). In the denial of Claimant’s prior claim, the ALJ determined that the evidence failed to establish: (i) pneumoconiosis; (ii) the pneumoconiosis arose out of coal mining employment; (iii) total disability; and (iv) the pneumoconiosis contributes to the total disability.

The Sixth Circuit has tightened the threshold requirement for cases that involve “subsequent claims.” In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), a multiple claim arising under the pre-amendment regulations at 20 C.F.R. § 725.309 (2000), the court reiterated that its decision in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) requires that the ALJ resolve two specific issues prior to finding a “material change” in a miner’s condition: (1) whether the miner has presented evidence generated since the prior denial establishing an element of entitlement previously adjudicated against him; and (2) whether the newly submitted evidence differs “qualitatively” from evidence previously submitted. *Flynn*, 353 F.3d at 477-79. Specifically, the *Flynn* court held that “miners whose claims are governed by this Circuit’s precedents must do more than satisfy the strict terms of the one-element test, but must also demonstrate that this change rests upon a qualitatively different evidentiary record.” *Id.* at 479. Once a “material change” is found, then the ALJ must review the entire record *de novo* to determine ultimate entitlement to benefits.

Newly-Submitted Evidence: Pneumoconiosis and Causation

Under the Act, “‘pneumoconiosis’ means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.” 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, the ALJ assigns heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or “B” reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). The ALJ assigns greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

The newly-submitted evidence of record contains two chest x-rays and opposing interpretations of each. The x-ray of August 1, 2003 is interpreted by Dr. Baker as 1/0, indicative of pneumoconiosis. Dr. Poulos rebuts this reading and describes his interpretation of the same x-ray as 0/0, negative for pneumoconiosis. As described *supra*, Dr. Alexander rebuts the positive reading with another positive reading. Drs. Alexander and Poulos are Board Certified Radiologists and certified B readers; Dr. Baker is a certified B reader. In claimant’s previous claim Dr. Baker provided an opinion indicating pneumoconiosis. Dr. Baker has seen the progression of the disease in the claimant and been consistent in his opinion, the ALJ will give weight to his opinion in that regard. Dr. Alexander reads 1/0 in the x-ray of October 14, 2005, whereas Dr. Broudy initially read the same x-ray as 0/0, negative for pneumoconiosis. Dr. Broudy is deserving of additional weight to his interpretation because he also was an x-ray

interpreter of the Claimant in his original claim. The ALJ finds that the weight of the evidence in regards to x-ray interpretation is at equipoise and therefore can not find for the Claimant on the x-ray evidence. See *Greenwich Collieries, et al.*, 512 U.S. 267.

The next method to determine pneumoconiosis is through biopsy or autopsy evidence. 718.202(a)(2). No autopsy or biopsy reports are available in the record. Therefore, the claimant can not support his claim of pneumoconiosis under this section of the regulations.

Pneumoconiosis can also be established by presumption as described in 20 C.F.R. §§ 718.304, 718.305, and 718.306. 718.202(a)(3). None of those presumptions are applicable to this case and hence claimant can not support his claim of pneumoconiosis under this section of the regulations.

The fourth and final method of determining pneumoconiosis is under 20 C.F.R. § 718.202(a)(4), a “determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the [Claimant] suffers or suffered from pneumoconiosis” as defined in 20 C.F.R. § 718.201. Since this claim is being processed under the regulations that became effective January 19, 2001 it is governed by the new evidentiary limitations and each side may only enter two medical opinions into the record. 725.414(a). The four medical opinions of record were discussed briefly *supra* and will now be looked at in greater detail.

Case law has established what a well-reasoned, well-documented medical report entails. A “documented” opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient’s history. See *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984).

A “reasoned” opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician’s conclusions. *Fields, supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner’s pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure.

Each of the Doctor’s opinions in question, Baker, Chaney, Broudy & Rosenberg, appear on the surface, and after much scrutiny, to be reasoned medical opinions. As discussed earlier, Drs. Baker and Broudy have the added benefit of having been exposed to the Claimants chest x-rays at his initial claim, and benefit from seeing the change due to the passage of time. Of course, what makes this case difficult for the ALJ is that Dr. Baker saw evidence of Pneumoconiosis in the original claim and continues to see it now, approximately ten years later;

whereas Dr. Broudy saw no evidence of pneumoconiosis in the original claim and continues to see no evidence at present.⁵

Dr. Chaney has been Claimant's treating physician for over twenty years. Section 718.104(d) provides that controlling weight may be given to the opinion of a treating physician if that physician's opinion is credible in reasoning and documentation in light of the evidence as a whole. 20 C.F.R. § 718.104(d)(5). The regulations specify that a treating physician-patient relationship is established by examining four factors:

1. *Nature of relationship.* The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;
2. *Duration of relationship.* The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain superior understanding of his or her condition;
3. *Frequency of treatment.* The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain superior understanding of his or her condition;
4. *Extent of treatment.* The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

20 C.F.R. § 725.104(d)(1)-(4).

The record clearly states that Dr. Chaney has treated the Claimant for his respiratory condition. The treatment records demonstrate that Dr. Chaney evaluates the Claimant's respiratory health at regular intervals. The treatment records cover a period from April 2002 to June 2005. In this period the Claimant has been examined by Dr. Chaney at a minimum three times annually, and has been seen up to eleven times annually. Dr. Chaney prescribes Claimant's medications for his respiratory ailments and has performed pulmonary function studies, arterial blood gas studies and taken chest x-rays to monitor his condition. The ALJ finds that the record supports a finding that Dr. Chaney is Claimant's treating physician in accordance with the regulatory factors described in section 725.104(d).

The Sixth Circuit has held that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003). However the court has also cautioned that treating physician opinions are not entitled to automatic deference or controlling weight. *Id.* See also *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492 (6th Cir. 2002).

⁵ None of the older evidence is being used as a basis in determining the threshold question of a material change in condition, but is being mentioned to show some of the weighing that the ALJ used to determine an outcome based on the subsequent medical opinions in the record.

I have found Dr. Chaney's opinion to be well reasoned and documented. His opinion is based on objective medical testing, long-term physical examination findings and past medical treatment records. The lengthy physician-patient treatment relationship has equipped Dr. Chaney with superior knowledge of the Claimant's respiratory condition as expressed in his opinion and treatment records. For the aforementioned reasons, the ALJ assigns substantial weight to Dr. Chaney's opinion.

In comparison, Dr. Rosenberg did not physically examine the Claimant and was not benefited in his diagnosis by a long history of actual physical examinations, such as Dr. Chaney benefited from. Though the ALJ finds Dr. Rosenberg's opinion to be well reasoned and documented, it does lack the additional credence that a hands-on examination would provide.

A non-examining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984); *Easthom v. Consolidation Coal Co.*, 7 B.L.R. 1-582 (1984). Indeed, in *Collins v. J & L Steel (LTV Steel)*, 21 B.L.R. 1-182 (1999), the Board cited to the Fourth Circuit's decision in *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438 (4th Cir. 1997) and held that it was error for the administrative law judge to discredit a physician's opinion solely because he was a "non-examining physician." Also, in *Chester v. Hi-Top Coal Co.*, BRB No. 00-1000 BLA (July 31, 2001) (unpub.), the Board cited to *Millburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998) to hold that an administrative law judge may not discredit a medical opinion solely because the physician did not examine the claimant. *But see Consolidation Coal Co. v. Director, OWCP [Wasson]*, Case No. 98-1533 (4th Cir., Nov. 13, 2001) (a consulting physician's opinion was entitled to less weight because it was not well-reasoned or well-documented).

In the case at bar the ALJ is not discrediting Dr. Rosenberg's opinion solely on the basis that he never physically examined the Claimant. Additionally, Dr. Rosenberg was hampered in his overall effectiveness by his necessary omission of the most recent positive x-ray findings of Dr. Alexander, a well credentialed and qualified BCR & B reader. When the ALJ looks at the record *in its entirety*, Dr. Chaney's opinion will be given greater weight than the others. Hence, the ALJ finds that the Claimant has proven the existence of pneumoconiosis by a preponderance of the evidence. Furthermore, the newly submitted evidence does differ qualitatively from the prior evidence and in turn satisfies the additional Sixth Circuit requirements of *Sharondale*, which were restated and amplified in *Flynn*.

The newly submitted evidence demonstrates the existence of pneumoconiosis, one of the elements of entitlement previously adjudicated against the Claimant. As a result, the ALJ shall review the entire record to determine entitlement to benefits and compare the sum of the newly submitted evidence with the earlier evidence.

Full Review of the Record

Pneumoconiosis

As discussed above, the ALJ found the newly-submitted evidence to support a finding of pneumoconiosis. Compared with the earlier submitted evidence of record, the ALJ comes to the same conclusion. Although the ALJ continues to find the x-ray evidence to be in equipoise and not able to support a finding of pneumoconiosis, the narrative medical evidence is sufficient to support a finding under section 718.202(a)(4), a physician's well documented and reasoned medical judgment. The ALJ places the greatest weight on Dr. Chaney's opinion. As discussed above, the ALJ finds his opinion to be well documented and reasoned and entitled to substantial weight as Claimant's treating physician.

In the prior record there are six different x-rays and thirty-nine separate interpretations, spanning the time frame of October 8, 1990 to January 25, 1994. Of the thirty-nine separate interpretations there are seven separate positive interpretations for pneumoconiosis and thirty-two negative readings.

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). This rule should not be mechanistically applied, however, in situations where the evidence would tend to demonstrate an "improvement" in the miner's condition. This is because the Board and courts agree that pneumoconiosis is progressive and irreversible. In a careful review of the evidence the ALJ has found no indication of improvement in the Claimant's medical condition and hence will accord controlling weight to the new evidence supplied in the subsequent claim as compared to the evidence that is over ten years old from the prior claim.

Causation of Pneumoconiosis

Once pneumoconiosis is established, the burden is upon the Claimant to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of the miner's coal mine employment. This can be established as follows, "[i]f a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment." 20 C.F.R. § 718.203(b).

The ALJ has found that Claimant was a coal miner for twenty years, and that he had pneumoconiosis. Claimant is entitled to the presumption that his pneumoconiosis arose out of his employment in the coal mines. No physician opining as to the presence of pneumoconiosis offers an alternative theory to rebut this presumption. *See Smith v. Director, OWCP*, 12 B.L.R. 1-156 (1989). Therefore, the ALJ finds that Claimant's pneumoconiosis arose from his coal mine employment.

Total Disability

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). Section 718.204(b) provides several criteria for establishing total disability. Under this section, the ALJ must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

Twenty C.F.R. § 718.204(b) provides the following five methods to establish total disability: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure;⁶ (4) reasoned medical opinions; and (5) lay testimony.⁷

Total disability may be established through a preponderance of qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 and require, in relevant part, that (1) each study be accompanied by three tracings, *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and, (3) for testing conducted after January 19, 2001, a flow-volume loop must be provided. The ALJ may accord lesser weight to those studies where the miner exhibited “poor” cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984). To be qualifying, the regulations provide that the FEV1 be qualifying *and* either (1) the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height, or (2) the result of the FEV1 divided by the FVC is equal to or less than 55 percent. The above most recent pulmonary function studies are in the record and all establish qualify results for total disability.⁸

Based upon the forgoing, the miner has established total disability pursuant to § 718.204(b)(2)(i) of the regulations. All three of the most recent valid pulmonary function studies show the result of the FEV1 divided by the FVC as less than 55 percent. There were seven prior pulmonary function studies in the record. Two were qualifying based on the FEV1 divided by FVC ratio, five were not qualifying. The ALJ has put the controlling weight on the most recent studies.

⁶ There is no evidence of cor pulmonale with right-sided congestive heart failure such that this method of establishing total disability will not be discussed further.

⁷ The Board holds that a judge cannot rely solely upon lay evidence to find total disability in a living miner’s claim. *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

⁸ Dr. Baker’s first study dated 08/01/03 was determined to be invalid.

Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii). In order to be qualifying, the PO₂ values corresponding to the PCO₂ values must be equal to or less than those found at the table at Appendix C. The above blood gas studies are in the record. Based upon the foregoing, the miner has not demonstrated total disability pursuant to § 718.204(b)(2)(ii) of the regulations. Neither of the recent blood gas studies in the record are equal to nor less than those found at the table at Appendix C. There were four prior blood gas studies, all non-qualifying for total disability. The ALJ has put the controlling weight on the most recent studies.

The final method by which Claimant may establish total disability is through medical opinion evidence wherein a physician has exercised reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques to conclude that the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. § 718.204(b)(2)(iv) (2005).

Initially, Claimant has the burden of establishing the exertional requirements of his usual coal mine employment. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989). Once a claimant establishes that he is unable to perform his usual coal mine employment, a *prima facie* case for total disability exists and the burden shifts to the party opposing entitlement to prove that the claimant is able to perform comparable and gainful work. *Taylor v. Evans and Grambrell Co.*, 12 B.L.R. 1-83, 1-87 (1988).

Claimant appeared credible and testified at the hearing that he last worked as a coal miner May 20, 2002. *Tr.* at 15. He described his job duties as including routinely lifting weights over fifty pounds and occasionally lifting weights of one hundred pounds. He was a section boss, ran equipment, bolted top, did bed work, shoveled belts, rolled up belts, worked on the belt structures, and had to move power. Based on this record, it is determined that Claimant performed heavy work. Comparing the exertional requirements of his last coal mining job with the physical limitations demonstrated on this record, it is determined that Claimant has established that he is totally disabled under 20 C.F.R. § 718.204(b)(2)(iv) (2005) through a preponderance of the medical opinion evidence of record.

All of the recent Doctor's reports came to the same conclusion, that Claimant is totally disabled. They differ on the cause of the disability but all found him to be totally disabled and unable to return to the type of coal mining work he had done previously. The ALJ concurs that based on the record the Claimant is totally disabled.

Total Disability Due to Pneumoconiosis

Section 718.204(c) contains the standard for determining whether a miner's total disability was caused by pneumoconiosis. A miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in section 718.201, is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal

mine employment. 20 C.F.R. §§ 718.204(c)(1)(i), (ii). Section 718.204(c)(2) states that, except as provided in Sections 718.305 and 718.204(b)(2)(iii), proof that the miner suffered from a totally disabling respiratory or pulmonary impairment as defined by Sections 718.204(b)(2)(i), (ii), (iv), and 718.204(d) shall not, by itself, be sufficient to establish that the miner's impairment was due to pneumoconiosis.

Except as provided by Section 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. 20 C.F.R. § 718.204(c)(2).

The Sixth Circuit Court of Appeals has stated that pneumoconiosis must be more than a "de minimus or infinitesimal Contribution" to the miner's total disability. *Peabody Coal Co. v. Smith*, 12 F.3d 504, 506-507 (6th Cir. 1997).

The Sixth Circuit has also held that a claimant must affirmatively establish only that his totally disabling respiratory impairment (as found under Section 718.204) was due "at least in part" to his pneumoconiosis. *Cf.* 20 C.F.R. 718.203(a). *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988); *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996) (opinion that miner's impairment is due to his combined dust exposure, coal workers' pneumoconiosis as well as his cigarette smoking history is sufficient). More recently, in interpreting the amended provision at Section 718.204(c), the Sixth Circuit determined that entitlement is not precluded by "the mere fact that a non-coal dust related respiratory disease would have left the miner totally disabled even without exposure to coal dust." *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, 264 F.3d 602 (6th Cir. 2001). A miner "may nonetheless possess a compensable injury if his pneumoconiosis materially worsens this condition." *Id.*

The reasoned medical opinions of those physicians who diagnosed the existence of pneumoconiosis and that the miner was totally disabled are more reliable for assessing the etiology of the miner's total disability. *See, e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995).

Dr. Chaney opined that Claimant's pneumoconiosis is a substantial contributing factor to his totally disabling respiratory impairment. Dr. Chaney based his opinion on a review of Claimant's medical history, medical records and multiple clinical evaluations over a twenty-year period. The ALJ finds Dr. Chaney's opinion to be well reasoned and documented. His opinion is based on objective medical testing, long-term physical examination findings and past medical treatment records. The lengthy physician-patient treatment relationship has equipped Dr. Chaney with superior knowledge of the Claimant's respiratory condition as expressed in his opinion and treatment records. For the aforementioned reasons, the ALJ assigns substantial weight to Dr. Chaney's opinion.

Dr. Baker's opinion is consistent regarding the etiology of Claimant's respiratory impairment. Dr. Baker diagnosed Claimant with legal pneumoconiosis and opined that it was partly caused and then aggravated by coal dust exposure. He determined that based on his physical exam and the aforementioned test results that the Claimant was totally disabled,

primarily due to his lung disease, which is due, in part, to his cigarette smoking and, in part, to his coal dust exposure and overall to both. This meets the requirements of section 718.204(c) as interpreted by the Sixth Circuit.

Of the earlier submitted opinions, Dr. Baker was the only physician to determine that Claimant suffers from pneumoconiosis and is totally disabled. His opinion was based on examination findings and objective testing. Drs. Lane, Myers, Wright, and Westerfield opined that the Claimant had neither pneumoconiosis nor a totally disabling respiratory impairment.

I find that Dr. Chaney's opinion, supported by Dr. Baker's opinion, to outweigh the opinions of Drs. Lane, Myers, Wright, and Westerfield. As discussed above, I find Dr. Chaney's opinion to be well documented and reasoned and entitled to substantial weight as Claimant's treating physician. In addition, the opinions of Drs. Chaney and Baker are more reliable for assessing the etiology of the Claimant's total disability as they diagnosed both existence of pneumoconiosis and that Claimant is totally disabled. *See e.g. Hobbs v. Clinchfield Coal Co.*, 45 F.3d 109 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). Dr. Chaney was the physician who most recently examined Claimant, which entitles his opinion to additional weight. For all of the aforementioned reasons, the ALJ finds that Claimant has established that he is totally disabled due to pneumoconiosis.

Claimant has established that he has pneumoconiosis and that it arose out of coal mine employment. In addition, Claimant has established that he is totally disabled due to pneumoconiosis. Accordingly, Claimant is entitled to benefits.

ENTITLEMENT

Claimant is entitled to benefits commencing on the date the medical evidence first establishes that he became totally disabled due to pneumoconiosis or, if such a date cannot be determined from the record, the month in which the miner filed his claim which, in this case, is July 2003. 20 C.F.R. § 725.503 (2005); *Carney v. Director, OWCP*, 11 B.L.R. 1-32 (1987); *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990). Moreover, it is noteworthy that the date of the first medical evidence of record indicating total disability does not establish the onset date; rather, such evidence only indicates that the miner became totally disabled at some prior point in time. *Tobrey v. Director, OWCP*, 7 B.L.R. 1-407, 1-409 (1984); *Hall v. Consolidation Coal Co.*, 6 B.L.R. 1-1306, 1-1310 (1984).

A miner's award of benefits should be augmented on behalf of a dependent spouse or child who meets the conditions of relationship pursuant to section 725.210. For the miner's benefits to be supplemented because of any of these relationships, the individual must qualify under both a relationship test and dependency test.

Claimant and Sharon Lynn Trent were married on September 22, 1979. Dx. 9. I find that the Claimant's wife is a dependent spouse for purposes of augmentation of benefits pursuant to sections 725.204 and 725.205.

Upon review of the record in this case, it is determined that the onset date cannot be determined from the medical evidence and, therefore, benefits are payable from July 1, 2003, the month in which the miner's claim was filed. Accordingly,

ORDER

IT IS ORDERED that the claim for benefits filed by Claimant is granted and the payment of benefits shall commence as of July 1, 2003.

IT IS FURTHER ORDERED that, within 30 days of the date of issuance of this *Decision*, Claimant's counsel shall file, with this Office and with opposing counsel, a petition for a representatives' fees and costs in accordance with the regulatory requirements set forth at 20 C.F.R. § 725.366. Counsel for the Director and for Employer shall file any objections with this Office and with Claimant's counsel within 20 days of receipt of the petition for fees and costs. It is requested that the petition for services and costs clearly provide (1) counsel's hourly rate with supporting argument or documentation, (2) a clear itemization of the complexity and type of services rendered, and (3) that the petition contains a request for payment for services rendered and costs incurred before this Office only as the undersigned does not have authority to adjudicate fee petitions for work performed before the district director or appellate tribunals. *Ilkewicz v. Director, OWCP*, 4 B.L.R. 1-400 (1982).

A

Daniel A. Sarno, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is:

**Benefits Review Board
U.S. Department of Labor
P.O. Box 37601
Washington, DC 20013-7601**

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).